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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 444

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

vs.

HUGHES TRANSPORTATION, INC., and INTERSTATE COMMERCE COMMISSION,
Respondents.

RESPONDENT'S, HUGHES TRANSPORTATION COMPANY, INC., BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

Question Presented 1

Countering Statement of the Case 2

Reasons for Denying the Writ 3

Conclusion 12

Table of Cases

Far East Conference v. *United States*, 342 U.S. 570 (1952) 9

Interstate Commerce Commission v. *Atlantic Coast Line Railroad*, 383 U.S. 576 (1966) 8, 12

McFaddin Express, Inc. v. *Adley Corp.*, 363 F.2d 546 (2d Cir. 1966) 12

N.L.R.B. v. *Denver Bldg. & Const. Tr. C.*, 341 U.S. 675 (1951) 9

Pennsylvania R.R. v. *United States*, 313 U.S. 202 (1960) 7, 8

Riss & Company v. *Association of American Railroads*, 178 F.Supp. 438 (D. D.C. 1959) 12

Scripps-Howard Radio v. *F.C.C.*, 316 U.S. 4 (1942) 9

United States v. *Borden Co.*, 347 U.S. 514 (1954) 11

United States v. *Western Pacific Railroad Co.*, 352 U.S. 161 (1956) 7

Statutes

Communications Act of 1934, Section 401(b)—
47 U.S.C., Section 401(b) 4

Federal Aviation Act of 1958, Section 1007(a)—
49 U.S.C., Section 1478(a) 4

Interstate Commerce Act, 49 U.S.C.—

Section 8 4
Section 9 4
Section 222(b) 4
Section 222(b)(2) 1, 3, 4, 5, 6, 7, 8, 9, 10, 12
Section 222(b)(3) 2, 3, 4, 5, 7, 9, 10
Sections 303(c), 306, 309, 311 3
Section 322(b) (1965 Amendment) 4
Section 417(b)(2) 5

Investment Company Act of 1940, Section 44—

15 U.S.C., Section 80a-43 4
United States Supreme Court Rule 19(1)(b) 7

OTHER AUTHORITIES

Conference Report No. 810, 1965 U.S. Code Cong. & Adm. News, Vol. 2, at 2943 5
111 Cong. Rec. 9673 8
1965 U.S. Code Cong. & Adm. News, Vol. 2, at 2929 ..... 6, 10-11

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QUESTION PRESENTED

Whether an action brought under §222(b)(2) of the Interstate Commerce Act in regard to a clear and patent violation of a common carrier's certificate need be stayed pending review of an Interstate Commerce Commission

order holding the carrier to be in violation of its authority when the Interstate Commerce Commission does not request a stay of the proceedings under §222(b)(3) of the Act.

COUNTERING STATEMENT OF THE CASE

Petitioner, Baggett Transportation Company ("Baggett"), implies in its STATEMENT that the Federal District Court for the Western District of Missouri had before it, as its only guide to the construction of Baggett's certificate, the Commission's decision and order in that regard (Baggett Brief 5). That court, in fact, had before it not only the provision of Baggett's certificate which was allegedly being violated, but also testimony from the president of Baggett as to their operations in joining and tacking various portions of their authority in order to provide through service (R. 71-73). Furthermore, the order of the district court in granting the temporary injunction made it amply clear that the decision was based upon "evidence introduced at the hearing on the motion for temporary injunction, that Baggett has been operating and will continue to operate in clear and patent violation of §303(c) and 306 of Title 49" (R. 23).

As is indicated by the STATEMENT of the Petitioner, the Interstate Commerce Commission intervened as a party-plaintiff in the suit brought by Hughes Transportation Company against Baggett, however, Baggett's STATEMENT does not indicate that the Interstate Commerce Commission specifically refused to file a notice to stay the proceedings before the district court in order to allow the Interstate Commerce Commission to make its own determination of any of the questions involved in the case (R. 76).

REASONS FOR DENYING THE WRIT

The question presented for review by the present case is uniquely narrow, and no amount of strained semantics may serve to expand the importance of the case into one warranting review by this Court on certiorari. The sole issue involved herein is whether a federal district court has jurisdiction to temporarily enjoin a clear and patent violation of a common carrier's authority in an action brought under Section 222(b)(2) of the Interstate Commerce Act ("Act") when the Interstate Commerce Commission has not filed a request to stay the proceedings under the provisions of Section 222(b)(3) and where there is pending for consideration before a three judge court the violating carrier's action to judicially review and set aside an order of the Interstate Commerce Commission prohibiting the violation of the carrier's authority.

Section 222(b)(2) of the Act which was enacted by Congress in 1965 provides that any person who is injured by a "clear and patent violation" of any of the provisions of Section 303(c), 306, 309 or 311 of Title 49, U.S.C. may apply to the district court of the United States to have the violation enjoined. Section 222(b)(3) allows the Commission to notify the district court in which a Section 222(b)(2) action is pending that the Commission intends to consider the matter in question, and the district court shall then "stay further action pending disposition of the proceeding before the Commission."

Petitioner has argued that similar private rights of action exist against other industries subject to regulation by federal agencies, and therefore the decision herein would have an application far beyond that of motor car-

riers (Petition Page 7). However, none of the statutory citations set forth by Baggett bear out this contention.[1]

Petitioner's entire argument is based upon the contention that the district court did not have jurisdiction to proceed until Baggett had an opportunity to have the Commission's order reviewed by a three judge court. It becomes necessary, therefore, to review the manner in which Baggett's certificate came under the scrutiny of the Commission. On May 10, 1966, Tri-State Motor Transit Company instituted a Section 222(b)(2) action in the federal district court seeking to enjoin petitioner from violating its authority. Pursuant to Section 222(b)(3), the Commission notified the court that it was going to consider the matter, and the proceedings before the court were then stayed. It is important to note that at the time the Commission requested a stay in the Tri-State proceedings the 1965 amendments to Section 222(b) of the Act had been in effect little more than twenty months.

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1. None of the statutory citations set forth in footnote 5 of the Petition contain provisions similar to the procedures provided in the 1965 Amendment to Section 222(b) of the Interstate Commerce Act, 49 U.S.C., Section 322(b). The Federal Aviation Act of 1958, Section 1007(a), 49 U.S.C., Section 1478(a), permits "any party in interest" to apply to district courts for enforcement of the Act by injunction but does not contain a provision allowing the C.A.B. to request a stay as a matter of right as does Section 222(b)(3) of the Interstate Commerce Act; Part I of the Interstate Commerce, §§8 and 9, 49 U.S.C., §§8 and 9, permits any person damaged by a violation of law by a rail carrier to make complaint to the Commission or institute an action in district court for recovery of damages, "but such person or persons shall not have the right to pursue both of such remedies, and must in each case elect which one of the two methods of procedure" he or they will adopt. 49 U.S.C., §9. No similar provision is contained in the 1965 Amendments to §222(b)(2); the Investment Company Act of 1940, §44, 15 U.S.C., §80a-43, contains no provision that would permit the Securities and Exchange Commission to request a stay of the proceedings in the district court such as that contained in §222(b)(3) of the Interstate Commerce Act; the Communications Act of 1934, §401(b), 47 U.S.C., §401(b), does not permit the district court to enforce the Communications Act but only applies to enforcement of Commission orders. 47 U.S.C., §401(b).

At that point in time, sufficient experience in operating under the new statute had not been forthcoming to enable the Commission to delineate the procedures to follow under the Amended Act which would result in the most expedient disposition of "clear and patent" violations of a common carrier. Conference Report No. 810 issued by the House managers of Section 222(b)(2) and Section 417(b)(2) (which contains identical provisions for injunctive relief against freight forwarders) makes it clear that the Interstate Commerce Commission was to have the authority and obligation to prevent harassment of carriers by unfounded Section 222(b)(2) suits:

> "It is expected that, if the procedures authorized by these amendments are used to harass legitimate operations being carried out under exemptions from the provisions of Part IV, the Interstate Commerce Commission will quickly intervene (under the provisions adopted on the House floor authorizing the Commission to take jurisdiction over such matters from the courts, and discussed above) to eliminate this practice." Conference Report No. 810, 1965 U.S. Code Cong. & Adm. News, Vol. 2, at 2943.

When Tri-State filed its Section 222(b)(2) action against petitioner, the Commission, out of an abundance of caution and lack of experience in handling their policing duties newly imposed under Section 222(b)(3), intervened and requested a stay of the district court proceedings. However, when Hughes filed its Section 222(b)(2) action against petitioner, the Commission specifically refused to request a stay,[2] for only by following this pro-

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2. During the hearing on the temporary injunction, Mr. Harry Horak, appearing for the Interstate Commerce Commission, made the following statement (R. 76):

> "For the record, Your Honor, it is the position of the Interstate Commerce Commission that this Court has statutory jurisdiction under Title 49, §322(b)(2) to issue an injunction as prayed for in the complaint.

cedure could the purpose of Section 222(b)(2) to eliminate delays in dealing with "clear and patent" violations be effectuated. This purpose of the 1965 Amendments was recognized in a House Report on the amendments which notes that: "Under existing law, procedures for dealing with certain motor carrier violations are often slow and cumbersome, and frequently ineffective." 1965 U.S. Code Cong. & Adm. News, Vol. 2, at 2929.

For purposes of this Court's determination herein, it must be assumed that the complained of actions of Petitioner were "clear and patent" violations of its authority for Baggett has not petitioned this Court's review on the basis that the activity did not constitute a "clear and patent" violation, but have chosen to rely upon the contention that the district court did not have jurisdiction to proceed without regard to the nature of the violation (QUESTION PRESENTED, Petition, p. 2). Furthermore, the Commission's specific refusal to request a stay in this action under the provisions of Section 222(b)(3) indicates the Commission's position to be that the complained of violations were "clear and patent." (See footnote 2, supra).

The probability of the factual and procedural situation presented by this case ever occurring again is distinctly remote. On cases filed under Section 222(b)(2) which do in fact involve "clear and patent" violations of the specified sections of the Act, the Commission will re-

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"It is further the position of the Commission that such an injunction should be issued assuming that plaintiff proves that it is entitled to same by reason of irreparable injury or damage and a clear and patent violation.

"I am also authorized to advise the Court in this proceeding that no notice will be filed by the Interstate Commerce Commission concerning its determination of any of the questions involved in this case."

fuse, as it did here, to request a stay under Section 222 (b) (3). In actions brought under Section 222(b) (2) which do *not* involve "clear and patent" violations, the Commission *will* request a stay and will continue to request stays in any other similarly brought injunction actions by other aggrieved persons. The procedural difficulties encountered in this case were occasioned by new duties and responsibilities imposed upon the Interstate Commerce Commission by newly enacted amendments, and the likelihood of there ever being a case in the future where a carrier's authority is being simultaneously considered by two separate federal district courts under two separate statutory jurisdictional grants is so small as to be negligible. Therefore, this is not a case involving "an important question of federal law"[3] so as to warrant review by this Court on certiorari.

Petitioner argues that the decision of the Court of Appeals is repugnant to this Court's decision in *Pennsylvania R.R.* v. *United States*, 313 U.S. 202 (1960). However, there are several important distinctions between that case and the case before the bar. In the *Pennsylvania* case there was no statute in existence which permitted a direct court action to determine the reasonableness of the rates charged by the railroad similar to Section 222 (b) (2) which permits an injured person to apply directly to the district court for injunctive relief. Furthermore, even if such a statute had come into play in *Pennsylvania*, it would have still been necessary to stay the Court of Claims proceeding for the question presented in that case involved the reasonableness of freight rates which is clearly a question necessitating the expertise of an administrative body. *Cf.*, *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 161 (1956). Furthermore,

3. U. S. Supreme Court Rule 19(1) (b).

the judge of the district court in the present case did not attempt to review the Commission's order, as was done in *Pennsylvania*, but based his decision on "the evidence introduced at the hearing on the motion for temporary injunction." (R. 23).

Baggett makes a feeble attempt by out of context citations from the debate on the amendments on the floor of the Senate, to show that Section 222(b)(2) was intended to apply only to uncertified carriers (Petition, p. 10). However, in referring to the proposed legislation during discussion on the floor of the House of Representatives, the Honorable Oren Harris, Chairman of the Committee on Interstate and Foreign Commerce, stated:

> "Section 5 of H.R. 5401 would permit any person injured by an illegal for-hire operation, *whether performed by a regulated or unregulated carrier*, to seek direct injunctive relief in a Federal district court." (Emphasis added). 111 Cong. Rec. 9673.

The remaining decisions relied upon by Baggett to support its Petition are likewise inapplicable to this case. Petitioner cites *Interstate Commerce Commission* v. *Atlantic Coast Line Railroad*, 383 U.S. 576 (1966), in support of the proposition that a carrier who does not participate in a Commission proceeding must await the outcome of litigation on the Commission order before proceeding with its enforcement action. What the court in that case actually held was that nonparticipating shippers must await the outcome of *enforcement* actions brought by *participating* shippers before proceeding with their enforcement actions and did not hold they must await the outcome of review proceedings before they could pursue their action. *Interstate Commerce Commission* v. *Atlantic Coast Line Railroad*, supra, 383 U.S. at 599-600.

The decision in *Far East Conference* v. *United States*, 342 U.S. 570 (1952), also relied upon by Baggett, involves the traditional application of the "primary jurisdiction" doctrine. The Supreme Court stated, in effect, that the Federal Maritime Board had the exclusive right to determine the issues in that case. That doctrine was preserved in the 1965 Amendments by insertion of Section 222(b)(3) which allows the Commission to intervene in the district court and request a stay. However, the present case does not draw into question the "primary jurisdiction" doctrine for here we are concerned with a "clear and patent" violation of the Act which does not require the expertise of the Commission for resolution.

Petitioner relies upon *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4 (1942), in support of its proposition that the power of a reviewing court to grant a stay is an essential element of judicial review of administrative orders. Be that as it may, the question presented in this case is not concerned with the power of a reviewing court to stay the Commission's order, but revolves around the independent grant of jurisdiction of Section 222(b)(2). Furthermore, the entry of the temporary injunction by the district court in no way prohibited the review court in Alabama from proceeding with the review of the Commission's order or the issuance of a stay thereon. *Cf.*, *N.L.R.B.* v. *Denver Bldg. & Const. Tr. C.*, 341 U.S. 675 (1951).

Baggett argues that the desired policy of uniformity of Commission orders would be adversely affected if the district courts are allowed to proceed before a full blown Commission proceeding, including review, is concluded. The simple answer to this lies in Section 222(b)(3) which

allows the Commission to intervene and to request a stay of the district court proceedings if it so desires. The legislative history of these amendments makes it amply clear that the Commission is given the responsibility of protecting the integrity of its statutory duties in the area of transportation covered by the amendments. During the debate on the floor of the House of Representatives the following colloquy occurred:

> "Mr. Friedel: . . . If Section 417 (which is identical to Section 222(b) in regard to freight forwarders) is amended will any person be permitted to seek a direct court injunction against a shippers' association while a case against that association is pending before the Interstate Commerce Commission?
>
> "Mr. Harris: . . . If the Interstate Commerce Commission has it before them, all they have to do is to notify the court and this provision (the stay provision) requires the court to stay proceedings pending the outcome of the matter before the Interstate Commerce Commission." 111 Cong. Rec. 9676.

Therefore, if the Commission is concerned that a Section 222(b)(2) action in a particular case would destroy the uniformity of Commission Orders or would serve to usurp powers granted exclusively to the Commission, the Commission can remedy the problem, if one there be, by the simple expedient of requesting a stay under Section 222(b)(3). The Commission in the present case, however, has specifically refused to request such a stay (See footnote 2, supra).

The decision of the Court below is clearly correct. In a House Report discussing the 1967 Amendments it was noted that: "Under existing law, procedures for dealing with certain motor carrier violations are often slow and cumbersome, and frequently ineffective." 1965

U.S. Code Cong. & Adm. News, Vol. 2, at 2929. Because of the difficulty in dealing with violations which were "clear and patent", Congress gave jurisdiction to the district court to grant direct injunctive relief to injured persons, and such grant of jurisdiction was limited only by a grant of right to the Commission to request a stay when it desired to do so. There is no indication in either the amendments or the legislative history of the amendments to indicate that Congress intended the district courts to be divested of jurisdiction except when the Commission specifically requested a stay under Section 222(b)(3). In *United States* v. *Borden Co.*, 347 U.S. 514 (1954), this Court held that the district court abused its discretion in denying the government an injunction solely on the basis that the defendants had already been enjoined as to the same violations in an action brought by individuals under 15 U.S.C., Section 26. The Court's reasoning appears from the following (347 U.S. at 518-19):

> "These private and public actions were designed to be cumulative, not mutually exclusive . . . (citations omitted). 'The scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.' *United States* v. *Bendix Home Appliances*, D.C. S.D. N.Y., 1945, 10 F.R.D. 73, 77."

The policies and reasoning would seem equally applicable to the converse of the situation in *Borden*.

Petitioner has argued that Respondent can apply to the Alabama court for a vacation of its restraining order or for a bond in such amount as Hughes deems sufficient to protect it from injury pending disposition of the ju-

dicial review action. A similar argument was rejected by the Supreme Court in *I.C.C.* v. *Atlantic Coast Line R. Co.*, supra.

In the Alabama action the bond is $300 and runs only in favor of a party "who is found to have been wrongfully enjoined or restrained." (Supp. R. 22). The bond, even if raised in amount, is no solace to Hughes since it has no cognizable claim for money damages (R. 21, 55). *McFaddin Express, Inc.* v. *Adley Corp.*, 363 F.2d 546 (2d Cir. 1966); *Riss & Company* v. *Association of American Railroads*, 178 F.Supp. 438 (D. D.C. 1959). Moreover, Hughes does not come within the purview of the bond since it is without power or authority to enforce the I.C.C.'s cease and desist order which is the only action being restrained by the Alabama court. By contrast, Baggett is well protected by the $100,000 bond pending the final outcome of the instant case (R. 27).

Furthermore, the venue provision entitling Hughes to pursue its injunctive action in any district where Petitioner operates and the right to reasonable attorney's fees, which are granted to injured persons under Section 222(b)(2), are substantial rights which would have to be abandoned if Hughes were left to proceed against Baggett only by intervening in the Alabama review action. *I.C.C.* v. *Atlantic Coast Line R. Co.*, supra.

CONCLUSION

Hughes has properly availed itself of an important new statutory remedy by obtaining a preliminary injunction to halt the unlawful operations of Baggett. The judicial review action pending in Alabama has in no way been adversely affected by the ruling of the Court below. Petitioner is seeking to delay the instant case merely so

that it may continue to operate illegally with impunity and to the great detriment of Hughes and its other competitors. For the foregoing reasons, Hughes respectfully submits that the Writ of Certiorari petitioned for should be denied.

Respectfully submitted,

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